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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

CHINA ENERGY CORPORATION, a Nevada  
corporation,

Plaintiff,

vs.

ALAN T. HILL, ELENA SAMMONS,  
MICHAEL SAMMONS, THOMAS S.  
VREDEVOOGD, TRUSTEE OF THE  
KIMBERLY J. VREDEVOOGD TRUST UA  
1007/2008, JUN HE, and RANDY DOCK  
FLOYD,

Defendants.

CASE NO. 3:13-cv-00562-MMD-VPC

**PLAINTIFF CHINA ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION  
TO DEFENDANT MICHAEL SAMMONS'  
MOTION TO DISMISS FOR WANT OF JURISDICTION**

PLAINTIFF CHINA ENERGY CORPORATION ("CEC"), by and through its attorneys  
at the law firms of GORDON SILVER and ULMER & BERNE LLP, hereby submits this

Memorandum in Opposition to Defendant Michael Sammons' Motion to Dismiss for Want of Jurisdiction (Dkt. No. 212) (the "Motion"). This Opposition is supported by the following memorandum of points and authorities, Federal Rule of Civil Procedure 12, all pleadings and papers on file herein, and any other materials this Court may choose to consider.

For the reasons set forth below, the Defendants' Motion should be denied.

### **MEMORANDUM OF POINTS & AUTHORITIES**

With this Motion, Mr. Sammons asks the Court, nearly nine months after this case began, to dismiss CEC's Complaint on the grounds that CEC did not join Cede & Co. in this action because he thinks Cede & Co., the record stockholder of his shares of CEC stock, was the only proper party to this action. In making that erroneous argument, Mr. Sammons again demonstrates his failure to grasp the holdings of the Supreme Court of Nevada in *Smith v. Kisorin USA, Inc.*, 254 P.3d 636 (2011).

The main argument presented by Sammons's Motion is his mistaken contention that under the *Smith* case *only Cede & Co.*, the record stockholder for his CEC shares, had a right under NRS Chapter 92A to dissent from the reverse stock split effectuated by CEC on July 3, 2013. On that basis, Mr. Sammons proceeds to say that CEC was required to name Cede & Co. as a defendant in this matter because it has an "interest which would be affected by the declaration" sought in Count I of CEC's Complaint. (Motion at 2 (citing NRS 30.130)).

Mr. Sammons is wrong, and his Motion should be denied. The Defendants in this case, though they all failed to adequately perfect their rights to a dissenters' appraisal under NRS 92A.440, are the proper parties to this case because (1) they are the only persons who are real parties in interest as to the outcome of this litigation and (2) all of them would have had dissenters' rights had they not forfeited those rights by failing to fulfill the requirements of NRS 92A.440.

#### **I. Cede & Co. Has No Interest that Could be Affected by the Declaration Sought in Count I of CEC's Complaint Because it Has No Real Interest in the Appraisal Action.**

Cede & Co. has no interest in the outcome of this litigation because it has no right to

1 receive payment for any of the shares at issue in this case. As the Nevada Supreme Court stated  
 2 in *Smith*, Cede & Co. acts as “the nominee for the Depository Trust Company,” with which  
 3 many brokers and beneficial stockholders hold their shares in “street name.” 254 P.3d at 638.  
 4 “The term ‘street name’ refers to a brokerage firm’s name in which securities *owned by another*  
 5 are registered.” *Id.* & n.1 (citing Black’s Law Dictionary 1557 (9th ed. 2009)). The “beneficial  
 6 holder of stock holds equitable title to corporate stock . . . .” *Id.* In other words, only a beneficial  
 7 stockholder owns the stock at issue and only the beneficial stockholder has the right to receive  
 8 the proceeds from an appraisal action. A record holder like Cede & Co., by contrast, is the mere  
 9 nominee holding shares “in trust” for the beneficial owner and has no right to the value of the  
 10 shares. See Black’s Law Dictionary 1214 (9th ed.) (defining, *inter alia*, “owner,” “beneficial  
 11 owner,” and “record owner”); see also *id.* at 1554 (defining “stockholder of record”).

12 Thus, regardless whether the beneficial owners succeed in pursuing an appraisal action  
 13 here, Cede & Co., as record owner, has no right to payment for the shares at issue and has no  
 14 “interest which would be affected by the declaration” sought in Count I of CEC’s Complaint.

15 **II. The Defendants Are Proper Parties to this Case Both Under the Nevada**  
 16 **Dissenters Rights Statute and Under the *Smith* Case.**

17 Mr. Sammons also argues, under the Supreme Court of Nevada’s holdings in *Smith*, that  
 18 he and his fellow defendants have no rights to dissent and are not proper parties to Count I of the  
 19 Complaint. Mr. Sammons is, again, wrong.

20 First, the plain language of the Nevada dissenters’ rights statute, NRS Chapter 92A,  
 21 Sections 300 through 500, runs directly contrary to Mr. Sammons’s assertion. Section  
 22 92A.380(1) provides that “*any stockholder* is entitled to dissent” from certain corporate actions.  
 23 (emphasis added). The term “stockholder,” in turn, is a defined term under the statute; it means  
 24 “a stockholder of record *or* a beneficial stockholder of a domestic corporation.” NRS 92A.325  
 25 (emphasis added). Therefore, there is no merit to Mr. Sammons’s contention that he and his  
 26 fellow defendants, as beneficial stockholders, “are not entitled to dissenter’s rights” in the first  
 27 instance. (See Motion at 3).<sup>1</sup> To the contrary, the statute expressly provides for beneficial

28 <sup>1</sup> As explained in numerous papers already before this Court, Mr. Sammons, along with all of his fellow defendants,

1 stockholders to assert dissenters' rights and specifies exactly the means by which they may assert  
2 such rights. *See generally* NRS 92A.300-500.<sup>2</sup>

3 Second, while the *Smith* case does make two holdings that are directly relevant to the  
4 outcome of Count I of CEC's Complaint, neither of those holdings comes close to standing for  
5 the proposition that Mr. Sammons relies upon in this Motion. The Nevada Supreme Court first  
6 held that a Nevada corporation "is not required to send dissenters' rights notices to beneficial  
7 owners because publicly traded corporations do not have access to contact information for all  
8 beneficial owners and are, in fact, unable to obtain this information unless the beneficial owner  
9 does not object." *Id.* at 640 (citing, *inter alia*, 17 C.F.R. § 240.14b-2(b)(4)(ii)(B) (2010)). The  
10 Court therefore held that beneficial owners, like the plaintiffs in *Smith* and Mr. Sammons here,  
11 "are not entitled to be sent a dissenter's rights notice under NRS 92A.410 and NRS 92A.430."  
12 *Id.* On that basis, the Court found that the corporation at issue fulfilled its obligation to provide  
13 notice of a right to dissent when, as CEC did in this case, it sent a dissenters' rights notice to the  
14 stockholder of record, Cede & Co. *Id.*

15 Next, contrary to Mr. Sammons's claims, *Smith* does not hold that the beneficial  
16 stockholders never had a right to dissent. Instead, after holding that only Cede & Co. was  
17 "entitled to receive a dissenters' rights notice," the Nevada Supreme Court held that the  
18 beneficial owners in that case had "lost their right to dissenter's appraisal" because they "failed  
19 to submit a sufficient demand for payment with the[ir] stock certificates attached." *Id.* & n.3. If  
20 the beneficial holders never had a right to dissenters' appraisal, as Sammons now claims in his  
21 Motion, they could not logically have "lost their right" by failing to submit their stock  
22 certificates with their demand for payment.

23 ///

24 \_\_\_\_\_ (continued)

25 did fail to *properly* assert dissenter's rights in this case because he failed to meet the strict prerequisites of NRS  
26 92A.440. That does not mean, however, that he never had any rights at all. Instead, he and the other Defendants  
27 waived the rights they had when they failed to adhere to NRS 92A.440.

28 <sup>2</sup> A beneficial stockholder may only assert his or her dissenters' rights after obtaining the record stockholder's  
"written consent." *See Smith*, 254 P.3d at 241 & n.3 (citing NRS 92A.400(2)(a)). But, once a beneficial stockholder  
obtains that written consent, he may exercise dissenters' rights if he complies with the requirements of NRS  
92A.440.

1           Simply stated, a thing that does not exist cannot be lost. The Nevada Supreme Court  
2 could not have held in *Smith* that the beneficial stockholders had no right to dissent but also hold  
3 that they “lost their right” to dissent by failing to timely dissent and submit their certificates to  
4 the subject corporation. Thus, Mr. Sammons’s claim that he and the other defendants are not the  
5 proper parties to this action – because they never had any dissenters rights at all – is legally  
6 erroneous. Furthermore, because Mr. Sammons and the other defendants in this case are the  
7 proper parties to CEC’s Complaint and no other parties needed to be joined, Mr. Sammons’s  
8 Motion should be denied.

9           **III. Even Assuming that Cede & Co. is a Proper Party to this Case, Mr.**  
10           **Sammons has Cured Any Purported Deficiency in CEC’s Complaint by**  
11           **Joining Cede & Co. Via His Third-Party Complaint.**

12           Finally, Mr. Sammons’s final contention that neither Count I nor Count II may proceed  
13 without Cede & Co.’s involvement is of no consequence. As he openly concedes in his Motion,  
14 Mr. Sammons has joined Cede & Co. by filing his Third-Party Complaint against it, alleging that  
15 Cede & Co. mishandled his demand.<sup>3</sup> Thus, while Mr. Sammons is wrong in contending that  
16 Cede & Co. is a necessary party to this action, even if this were a deficiency, he has cured it.

17           For this reason, also, Mr. Sammons’s Motion should be denied.  
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24           <sup>3</sup> Notably, if Cede & Co. really was a party that had an interest that needed to be protected under the Nevada  
25 Declaratory Judgment Act, NRS 30.130, then it would stand to reason that it would attempt to assert a dissenters’  
26 rights claim against CEC. It has not done so because it no doubt recognizes that it has no beneficial interest in the  
27 outcome of this litigation and no right to whatever proceeds the defendants may be entitled to receive. Thus, it is  
28 undisputed that Cede & Co. did not exercise dissenters’ rights. As a result, if Mr. Sammons was correct that Cede &  
Co. is actually the real party in interest in this case, the Court should enter Judgment in favor of CEC declaring that  
no stockholder complied with Chapter 92A of the Nevada Revised Statutes and, therefore, that no defendant is  
entitled to payment under Chapter 92A.

**CONCLUSION**

For the foregoing reasons, Defendant Michael Sammons' Motion to Dismiss for Want of Jurisdiction (Dkt. No. 212) should be denied.

DATED this 6<sup>th</sup> day of June 2014.

**GORDON SILVER**

/s/ Justin J. Bustos

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to FRCP 5(b), hereby certifies that she served a copy of **PLAINTIFF CHINA ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION TO DEFENDANT MICHAEL SAMMONS' MOTION TO DISMISS FOR WANT OF JURISDICTION** via CM/ECF to the following individuals:

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And by U.S. Mail, postage prepaid, to the following individuals:

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DATED this 6<sup>th</sup> day of June, 2014.

/s/ Cindy S. Grinstead  
An employee of GORDON SILVER